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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BLACKWATER LODGE AND TRAINING CENTER, INC., a Delaware corporation dba Blackwater Worldwide,

Plaintiff,

v.

KELLY BROUGHTON, in his capacity as director of the Development Services Department of the City of San Diego; AFSANEH AHMADI, in her capacity as Chief Building Official of the City of San Diego; THE DEVELOPMENT SERVICES DEPARTMENT OF THE CITY OF SAN DIEGO; THE CITY OF SAN DIEGO, a municipal entity; and DOES 1-20, inclusive,

Defendants.

Case No. 08 CV 0926 H (WMC)

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PURSUANT TO F. R. CIV. P. 12(b)(6)

[Request for Judicial Notice and Appendix of San Diego Municipal Code Authority Filed Concurrently Herewith]

Date: August 11, 2008
Time: 10:00 A.M.
Place: Courtroom Of The Honorable Marilyn L. Huff

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I. INTRODUCTION

This is a simple case. Plaintiff Blackwater Lodge and Training Center, Inc. dba Blackwater Worldwide ("Blackwater") was granted building permits for remodeling of warehouse premises within the Otay Mesa Development District in the City of San Diego (the "Otay Mesa facility"). Blackwater performed the remodeling and obtained final approval from the City on April 30, 2008, including approval for a Certificate of Occupancy, which the City was then required to issue under San Diego Municipal Code ("SDMC") § 129.0114.

When the City decided not to do what it was mandated to do (i.e., issue the Certificate of Occupancy), Blackwater brought suit for declaratory and injunctive relief and violation of its state and federal constitutional rights. In hearings and subsequent orders on Blackwater's requests for a temporary restraining order and preliminary injunction, both of which were granted, the Court upheld Blackwater's position and ruled that there was a strong likelihood that Blackwater would prevail on the merits of its claims that (1) the City was required to issue a Certificate of Occupancy for the Otay Mesa facility, and (2) the City's failure and refusal to issue the Certificate of Occupancy constituted a denial of procedural due process actionable under 42 U.S.C. § 1983.

Defendants (hereinafter, "the City") now move to dismiss Blackwater's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) on the purported ground that the Complaint fails to state a claim upon which relief can be granted. The Motion raises many arguments that the City already made to no avail, or that should have been made earlier. In any event, the Court has already ruled, twice, that Blackwater has a strong likelihood of prevailing on its central claims for injunctive relief and violation of procedural due process. Indeed, the City is now trying to relitigate legal and – completely inappropriately – factual issues previously decided against it by the Court. Although a 12(b)(6) motion is supposed to address whether the facts alleged in the Complaint state a claim upon which relief can be granted, the City's Motion ("Mot.") provides only a brief, incomplete account of the Complaint's factual allegations (Mot. at 2-3) and then basically ignores them and the legal requirements governing a 12(b)(6) motion. The City relies instead on its own account of the facts.

The City's principal claim is that Blackwater somehow failed to state a claim because the City was entitled to subject Blackwater's building permits and its proposed occupancy and use of the Otay Mesa facility to further discretionary review as a condition before issuing a Certificate of Occupancy. But the Complaint pleads the opposite. Furthermore, the parties have extensively briefed that issue on the temporary restraining order and preliminary injunction, and it has already been decided by the Court against the City. Not surprisingly, the City's central claim remains deficient in both fact and law.

It is factually deficient because it ignores crucial facts alleged in the Complaint and also depends upon "facts" which are outside the Complaint. That is, of course, improper on a motion to dismiss. It is legally deficient because it does not—and cannot—refute the legal basis for Blackwater's claim: that the City's issuance of the Certificate of Occupancy for the Otay Mesa facility was mandatory, not discretionary. *See* SDMC § 129.0114. Moreover, the provisions of the SDMC relied upon by the City are either inapplicable or fail to show that the City is entitled to require Blackwater to undergo discretionary review with respect to the Otay Mesa facility.

The City's arguments mostly collapse once its central claim – that further discretionary review was required – is refuted. The City's arguments that Blackwater's claims are not ripe or that the Court should abstain depend upon the myth that the City has not reached a "final decision" and that further discretionary review is required. The City's attacks on Blackwater's claims for injunctive and declaratory relief depend entirely on its assertion that further discretionary review is required. Likewise the City's discussion of procedural due process depends on unsupported (and false) assertions that (1) Blackwater did not have a property right in the issuance of a Certificate of Occupancy because (2) the City had not exhausted its discretionary review process.

Furthermore, contrary to the City's argument, Blackwater has stated claims for relief for violation of its equal protection rights, because the City has attempted to impose requirements on the Otay Mesa facility over and above that imposed upon other vocational training facilities and shooting ranges. Blackwater likewise has stated a claim for relief under the dormant commerce clause because the City has attempted to impose requirements on Blackwater, an out-of-state company, over and above those imposed upon similar in-state companies.

Finally, the City's argument that Blackwater violated the California Government Claims Act is without merit. Under the Supremacy Clause, the Claims Act does not apply to Blackwater's *federal* claims. It likewise does not apply to Blackwater's state claims, because the relief sought is primarily injunctive or declaratory, and money damages are only incidental.

II. STATEMENT OF FACTS[1]

Blackwater has a contract with the U.S. Navy to provide firearms training to U.S. Navy sailors. Complaint ¶¶ 1, 20. Blackwater leased the Otay Mesa facility to perform this contract. *Id.* ¶ 25. Under its contract with the Navy, Blackwater was required to begin training a class of sailors on June 2, 2008. *Id.* ¶ 23. In September, 2007, Blackwater, through a contractor, applied for and obtained a building permit to construct 44 feet of new partitions in the Otay Mesa facility. *Id.* ¶¶ 27-28; Order Granting Preliminary Injunction [Doc. 32] at 2:24-3:8. On October 1, 2007, Blackwater, through a contractor, applied for and obtained a building permit for the installation of air conditioning units and exhaust fans. Complaint ¶ 30; Order Granting Preliminary Injunction [Doc. 32] at 3:9-12. The application listed the proposed use of the Otay Mesa facility as "Training." *Id.*

On February 6, 2008, Blackwater filed a Business Tax Application with the City for the Otay Mesa facility. Request for Judicial Notice filed concurrently herewith ("RJN"), Ex. A. Under "Primary Business Activity," Blackwater stated that "Blackwater will conduct security training for the United States Navy." Under "Additional Business Activity," Blackwater stated that "Blackwater has contracted with the United States Navy to conduct a course called 'Ship Reactionary Force Basic' (SFR-B)." *Id.*

On February 7, 2008, Blackwater, through a contractor, applied for an obtained a building permit for electrical work. Order Granting Preliminary Injunction [Doc. 32] at 3:13-20. At the same time, Blackwater, through another contractor, applied for a building permit to "add

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[1] This Section does not purport to provide a complete account of the relevant facts. Additional facts are cited where pertinent to the Argument below.

[an] indoor firing range" to the Otay Mesa facility. Complaint ¶ 30; RJN Ex. B at 1. The application notes a change in use for the Otay Mesa facility from "Warehouse" to "Training Facility." *Id.* at 1. When the permit was granted on March 19, 2008, the scope was noted as "Building permit to add modular training facility inside of [existing] warehouse for [existing] Southwest Law Enforcement facility." *Id.* at 3.

All the building permits that Blackwater obtained were "ministerial permits". Order Granting Preliminary Injunction [Doc. 32] at 2:23-4:20. That is, the City was required to issue such permits if the work described in the application complies with building codes and other applicable laws. Such ministerial permits are described in the SDMC as "Process One" and can be issued by a staff member without any input from or approval by the City's Planning Commission or the City Council. Complaint ¶¶ 3 n.1, 27; SDMC §§ 129.0212, 112.0501, Diagram 112-05A. Blackwater completed the projects for which it obtained these ministerial permits. Complaint ¶ 42.

On April 29, 2008, Blackwater staff and its contractors met with Defendant Ahmadi, the Chief Building Official of the City, at her request. *Id.* Ms. Ahmadi reviewed Blackwater's plans and walked through the Otay Mesa facility. *Id.* The next day, on April 30, 2008, the City's Structural Engineer conducted a final inspection of the Otay Mesa facility, found Blackwater in compliance with all relevant provisions of the SDMC and approved issuance of a Certificate of Occupancy pursuant to SDMC §§ 129.0113(a) & 129.0114. *Id.* The City's Structural Engineer signed the City's Inspection Record, specifically signing and dating the "Certificate of Occupancy" line to indicate that a Certificate of Occupancy had been approved. RJN Ex. C.

At that point the City had a ministerial duty to issue a Certificate of Occupancy. As set forth in SDMC § 129.0114, entitled "Issuance of a Certificate of Occupancy," "The Building Official shall inspect the structure and if the Building Official finds no violations of the Land Development Code or other regulations that are enforced by the City's designated Code Enforcement Official, the Building Official *shall* issue a certificate of occupancy." No further permits or approvals were necessary from the City of San Diego for Blackwater to commence its training program at the Otay Mesa facility. Complaint ¶ 43.

As a result of political influence, the City did *not* issue the Certificate of Occupancy as it was required to do. A primary election was scheduled for the City on June 3, 2008. Both the Mayor and the City Attorney were locked in tough re-election battles. Beginning in late-April, 2008, candidates in the primary election and local activists made Blackwater and the Otay Mesa facility an issue in the election for Mayor and City Attorney. *Id.* ¶¶ 3, 44-46.

On May 5, 2008, the Mayor requested that the City's Chief Operating Officer "conduct an investigation into the permits granted so far and permits yet to be granted" for Blackwater's Otay Mesa facility. *Id.* ¶ 47. On May 16, 2008, the City Attorney purportedly responded to the Mayor's request for an investigation (that was not addressed to him) by issuing a Memorandum recommending the issuance of a "Stop Work Order," or, in the alternative, the revocation of the Certificate of Occupancy for the Otay Mesa facility. *Id.* ¶ 48 & Ex. B thereto.

On May 19, 2008, the City completely reversed the position it took at the final inspection of the Otay Mesa facility on April 30, 2008. Before the audit report requested by the Mayor was even issued, Defendant Broughton in his capacity as Director of the City's Development Services Department, informed Blackwater in writing that "[t]he City will not issue a certificate of occupancy for the [Otay Mesa facility] . . . ." *Id.* ¶¶ 51-53 & Ex. D thereto.

On June 5, 2008, the City's Internal Auditor, who had been requested by the Chief Operating Officer to conduct the investigation requested by the Mayor on May 5, 2008, issued an Audit Report entitled "Audit of Permits Issued For The Blackwater Facility." RJN Ex. D. The Audit Report addressed the following questions:

1. Did Blackwater misrepresent its identity or intended use of the Otay Mesa facility? *Id.* at 1. The Audit Report concluded that Blackwater did not misrepresent its identity. *Id.* at 5. Regarding the use of the facility, the Report noted that at least two permit applications indicated that the use was "Training." *Id.* The Report further noted that Blackwater's "business tax certificate application is direct evidence that Blackwater represented to the City their intent to operate a training facility at the address." *Id.* at 7.

2. Did Development Services' staff properly issue permits in compliance with codes and regulations for the Otay Mesa facility? Is the designation of vocational/trade school

appropriate for the Otay Mesa facility? RJN Ex. D at 1. The Audit Report determined that "DSD staff had the authority under [SDMC §] 111.0205 to classify Blackwater's use of the building as a vocational/trade school." *Id* at 8. The Audit Report further noted that "DSD classified the American Shooting Center, another shooting range located in the City, as a vocational/trade school. Vocational/trade school, a permitted use, may be approved or denied by staff in accordance with a process one review." *Id.*

III. NONE OF THE CITY'S ARGUMENTS HAVE MERIT

A. The City Still Cannot Show That Further Discretionary Review Was Proper

The City's central claim, which it relies upon throughout its Motion, is that Blackwater has failed to state a claim because it was required to undergo discretionary review by the City before it could use the already-permitted, remodeled and approved areas of the Otay Mesa facility. This claim fails, for a number of reasons.

First, the City does not—and cannot—identify any specific additional process that Blackwater supposedly was required to follow. Indeed, the City completely overlooks that it gave final approval to the Otay Mesa facility on April 30, 2008, signing off that it complied with the applicable codes and specifically approving the issuance of a Certificate of Occupancy. Complaint ¶ 42. The City likewise fails to address the legal consequences of this. Under SDMC § 129.0114, the City "*shall* issue a certificate of occupancy." *Id.* ¶ 43. As is clear from the Table of Authorities in the City's Motion, the City's Motion to Dismiss does not even cite SDMC § 129.0114.

Second, the City fails to discuss the case law addressing this situation. "[A] city has a mandatory duty to issue a certificate of occupancy once it has found that a construction project has complied with all requirements." *Inland Empire Health Plan v. Superior Court,* 108 Cal. App. 4th 558, 593 (2003). Furthermore, "the discretion to issue a building permit at all is much broader than the discretion which must be exercised in determining whether to issue a certificate of occupancy. Once the building permit *has been issued,* it cannot be de facto revoked by the simple expedient of never issuing the certificate of occupancy." *Thompson v. City of Lake Elsinore,* 18 Cal. App. 4th 49, 57-58 (1993). Again, as is clear from the Table of Authorities in the City's Motion, the City's Motion to Dismiss does not cite either *Inland Empire Health Plan* or *Thompson*.

Third, the City's premise is outside of and/or inconsistent with the factual allegations of the Complaint and thus improper under the rules governing a 12(b)(6) Motion. For example, the City claims that "[t]he core question is whether the agency has **completed its decision making process,"** Mot. at 6:12 (bold in original) and spends two-and-a-half pages arguing that "The City Land Use Approvals Have Not Been Completed," *Id.* at 13-15. However, the Complaint alleges that the City gave final approval to Blackwater's plans and the Otay Mesa facility on April 30, 2008. Complaint ¶ 42. And the Court has concluded as much in granting the temporary restraining order and preliminary injunction.

In the same vein, the City asserts that Blackwater failed to "adequately disclos[e] the full nature of its intended use of the [Otay Mesa] facility," Mot. at 15:12-13. There is no factual allegation to that effect in the Complaint; furthermore, such an assertion is inconsistent with Blackwater's business tax application dated February 6, 2008 (more than three months before the City reversed course on May 19, 2008 and decided not to issue a Certificate of Occupancy) which stated that "Blackwater will conduct security training for the United States Navy" and "Blackwater has contracted with the United States Navy to conduct a course called 'Ship Reactionary Force Basic' (SFR-B)." RJN Ex. A.

For another example, the City asserts that "[o]n May 19, 2008, Broughton, as the City's DSD Director, exercised his discretion under SDMC §§ 111.0205, 131.0110(a) and 1517.0301(c)(2) to require Blackwater's use of the [Otay Mesa facility] as a military training center to undergo further land use review," Mot. at 13:12-14. Again, this factual allegation is outside of and inconsistent with the Complaint. In any event, Defendant Broughton's letter, attached as Exhibit D to the Complaint, does not cite any of SDMC §§ 111.0205, 131.0110(a) and 1517.0301(c)(2) and thus does not purport to exercise discretion pursuant thereto. Complaint ¶¶ 51-53 & Ex. D thereto. The letter likewise makes no reference to Blackwater's use of the Otay Mesa facility as a "military training center." *Id.* In order to conceal the pretextual underpinnings of its reversal of position, the City's Motion to Dismiss is now attempting to rewrite history by mischaracterizing Defendant Broughton's letter.

Finally, the provisions of the SDMC cited and relied upon by the City to support its purported right to discretionary review are either inapplicable or fail to support the City's position. The City proffers a number of purported statutory bases, none of which were set forth in Defendant Broughton's May 16, 2008 letter. Although this issue has already been briefed and ruled on by the Court on the preliminary injunction, Blackwater briefly address the City's claims.[2]

1. The City relies upon SDMC § 112.0103, which provides that multiple permits required for a single development can be "consolidated for processing." Mot. at 13:21-25. The City attempts to argue that such "consolidated processing" allows the City to review a project based on the totality of circumstances and deny a certificate of occupancy even where (as here) the City had issued numerous building permits and the applicant had performed the required remodeling in accordance with applicable codes. SDMC § 112.0103 cannot carry that weight, nor should it.[3] All of Blackwater's construction permits were subject to only Process One, or ministerial review. *See* SDMC §§ 129.0107, 112.0501, Diagram 112-05A; Tr. 5/30/08 (Doc. 15) at 42-44; Order Granting Preliminary Injunction [Doc. 32] at 2:23-4:20. The City's Land Development Manual explains that consolidation under SDMC § 112.0103 does not apply to Process One approvals, such as those required for Blackwater's facility. RJN Ex. E (Manual at p. 5, "If more than one type of decision is required for your project, then the decisions are consolidated (***except for Process One Decisions***)") (emphasis added). SDMC § 112.0103 thus fails to support the City's claim that the Otay Mesa facility was subject to further discretionary review.

2. The City relies upon SDMC § 121.0308, which provides that issuance of a construction permit does not grant the applicant a right to violate pertinent codes, regulations or

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[2] The City cites numerous provisions of the SDMC, many of which are unexplained and as to which the City makes no attempt to explain their connection with the facts of this case. This Opposition does not address those unexplained and unconnected SDMC provisions.

[3] From a policy perspective, the City's argument clearly proves too much. If all projects in San Diego were subject to retroactive, "totality of the circumstances" review at some point in their future, it would destabilize all ministerial "approvals," and render the city's "Process One" review designation meaningless.

laws. Mot. at 14:16-26. However, the City nowhere explains what codes, regulations or laws Blackwater is violating; furthermore, by approving a certificate of occupancy for the Otay Mesa facility on April 30, 2008, the City determined that the Otay Mesa facility was in compliance with applicable codes, regulations or laws. Complaint ¶¶ 42-43; SDMC § 129.0114.

3. The City claims that under SDMC § 1517.0201(a)(2), Blackwater was required to submit an application stating the intended use of the Otay Mesa facility. Mot. at 18: 6-9. But Blackwater complied with this by its building permit applications stating that the use of the Otay Mesa facility would be for "Training" and "add[ing] [an] indoor firing range" (Order Granting Preliminary Injunction [Doc. 32] at 3:9-12, 21-28), and by filing a business tax certificate application in February 2008 for the Otay Mesa facility stating that "Blackwater will conduct security training for the United States Navy" and "Blackwater has contracted with the United States Navy to conduct a course called 'Ship Reactionary Force Basic' (SFR-B)." RJN Ex. A. The City's own Audit Report noted that Blackwater's "business tax certificate application is direct evidence that Blackwater represented to the City their intent to operate a training facility at the address." RJN Ex. D at 7.

4. The City claims that the Otay Mesa facility was not properly classified as a vocational/training school under SDMC § 1517.0301(a)(8)(A). Mot. at 18:22-19:3. However, the Court has already rejected this assertion in connection with both the temporary restraining order and the preliminary injunction. Order Granting Preliminary Injunction [Doc. 32] at 10-12; Order Granting Temporary Restraining Order [Doc. 16] at 7-8. Furthermore, the City's own Audit Report concluded that "DSD staff had the authority under [SDMC §] 111.0205 to classify Blackwater's use of the building as a vocational/trade school." RJN Ex. D at 8. On April 24, 2008, Defendant Broughton (before he succumbed to political influence) wrote to the City's Chief Operating Officer that: "In addition to heavy industrial and commercial uses, vocational/trade schools are permitted in the Otay Mesa Development District Zone. *Training for any vocation or trade including training for security work would, therefore, be allowed by right.*" *Id.* at Attachment III (emphasis added). On May 12, 2008, another DSD official wrote that:

> *[T]he facility will be providing training for uses allowed in the zone.* The project proposes security, law enforcement and/or military training. Security guard type uses would be classified as business support. Business support uses are permitted in the OMDD by SDMC 1517.0301(a)(7). There are many examples of security guards at other properties in Otay Mesa that have the same zoning designation. Law enforcement and military uses are classified within the government office use category. Government offices are permitted in the OMDD by SDMC 1517.0301(a)(1).

Id. at 9, quoting Attachment IV. In short, the claim that the Otay Mesa facility was not properly classified as a vocational/training facility and not allowed as a matter of right in the Otay Mesa Development District is baseless.

5 The City claims that it has not yet had a chance to evaluate whether Blackwater's Otay Mesa facility complies with SDMC § 1517.0202(a)(2). Mot. at 18:10-21. This claim fails for two separate reasons. First, SDMC § 1517.0202(a)(2) only comes into play as an exception to the requirement for an Otay Mesa Development District Permit. However, the Otay Mesa facility is exempt from the requirement for an Otay Mesa Development District Permit under SDMC § 1517.0201: "[a]pproval of an Otay Mesa Development District Permit is not required for interior modifications, repairs or remodeling . . . ." Since Blackwater's construction activities at the Otay Mesa facility only involved "interior modifications, repairs or remodeling," Blackwater does not need to rely upon SDMC § 1517.0202(a)(2) for an exemption from the requirement of obtaining an Otay Mesa Development District Permit.

Even if SDMC § 1517.0202(a)(2) were relevant, it does not support the City's argument. Compliance with § 1517.0202(a)(2) requires compliance with three other code sections. The first section, 1517.0204, has to do with making sure developers erecting new *residential* facilities fund enough parks and other public facilities before development. That section does not apply to Blackwater's industrial use. The second section, 1517.0301, denotes the permitted uses in the Otay Mesa Development District. As explained above, Blackwater's facility is a permitted use as of right as a vocational/training facility. The third section, 1517.0305, contains property development regulations, such as the minimal street frontage and setbacks, that apply to new building construction. Blackwater built no new building. Thus, these three code sections either do not apply or have been complied with by Blackwater.

In summary, the City's arguments based on various SDMC provisions lack merit and provide no basis for the City's claim that the City was entitled to require the Otay Mesa facility to undergo discretionary review. As the Court has already correctly stated: "Defendants cannot point to any provision of the [SDMC] that allows the City to conduct all required inspections and approve all permits and occupancy, only to later decide not to issue the formal certificate of occupancy." Order Granting Preliminary Injunction [Doc. 32] at 14:5-8. Tellingly, the City still cannot point to any such provision or any provision allowing a further review based on the "totality of the circumstances."

B. The City Fails To Show That Blackwater's Claims Are Unripe

As the City itself concedes, "ripeness" is an issue under the case-or-controversy requirement of Article III of the U.S. Constitution. Mot. at 5:26-28. It therefore implicates subject matter jurisdiction and F. R. Civ. P. 12(b)(1), not F. R Civ. P. 12(b)(6) or failure to state a claim upon which relief can be granted. "[M]otions raising the ripeness issue are treated as brought under Rule 12(b)(1), even if improperly identified by the moving party as being brought under Rule 12(b)(6)." *St. Clair v. City of Chico,* 880 F.2d 199, 201 (9th Cir. 1989). A lack of ripeness would not show that Blackwater has failed to state a claim upon which relief can be granted, only that this Court lacks jurisdiction to decide those claims. Even though the Motion is brought under F. R. Civ. P. 12(b)(6), and 12(b)(6) only, Blackwater briefly addresses the City's ripeness claim.

The City's argument cites general principles regarding ripeness with little, if any, explanation as to how those principles related to the facts of this case as alleged in the Complaint. The basis for the City's argument appears to be "the absence of a factual record to demonstrate **final agency action,"** Motion at 6:25-26 (bold in original). The City concludes by asserting that "any judicial determination in this case would be premature until such time as the City has completed its regulatory land use zoning review . . . ." *Id.* at 7:1-2. As explained above, Section III(A), the assertion that the City may require further discretionary review of the Otay Mesa facility is both legally baseless and inconsistent with the facts alleged in the Complaint and established during the preliminary injunction proceeding. It therefore cannot provide a basis for dismissing Blackwater's claims for failure to state a claim upon which relief can be granted.

C. There Is No Basis For The Court To Abstain Under *Pullman* Or *Younger*

The City also argues that the Court should abstain from adjudicating Blackwater's claims under the doctrines of *Pullman* and *Younger* abstention. *See Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941) and *Younger v. Harris*, 401 U.S. 37 (1971). Again, abstention implicates quasi-jurisdictional concerns rather than the merits of Blackwater's claims under Rule 12(b)(6) and thus is not a proper basis for this Motion brought under Rule 12(b)(6) and Rule 12(b)(6) only. Indeed, at the hearing on Blackwater's request for a TRO, the Court noted that the City could raise abstention in its opposition to the preliminary injunction. Tr. 5/30/08 H'rg [Doc. 15] at 50:1-3. The City did not do so. And at the preliminary injunction hearing, the Court specifically asked the City Attorney if the City was requesting that the Court abstain, and the City represented that it was not. Tr. 6/17/08 H'rg [Doc. 35] at 37:25-38:9. In another about face, the City now argues the Court should abstain. Abstention is not appropriate here.

1. *Pullman* Abstention

Generally, "*Pullman* abstention is an extraordinary and narrow exception" to a federal court's "unflagging duty" to adjudicate a controversy. *Cinema Arts, Inc. v. County of Clark*, 722 F.2d 579, 580, 582 (9th Cir. 1983). A party seeking abstention must show (1) the complaint touches a sensitive area of social policy upon which the federal courts should not enter unless no alternative to its adjudication is open; (2) federal constitutional adjudication can be avoided by a definitive ruling on state-law issues; and (3) the possibly determinative issue of state law is doubtful or unclear. *Smelt v. County of Orange*, 447 F.3d 673, 679 (9th Cir. 2006); *United States v. Morros*, 268 F.3d 695, 703-04 (9th Cir. 2001). The City cannot satisfy either the first or the third element.

First, there is no doubtful state law issue here. *Pullman* abstention is only appropriate when the "possibly determinative issue of state law is doubtful." Federal courts should only consider abstaining if "the issues of state law [are] substantially uncertain or ambiguous, necessitating a construction by the state supreme court." *Carreras v. Anaheim*, 768 F.2d 1039, 1043 n.5 (9th Cir. 1985) (citations omitted). Here, California law is clear and there is no need for interpretation by the California courts. When an applicant meets the requirements for a nondiscretionary permit, a municipality cannot arbitrarily deny the permit. *Inland Empire Health Plan*, 108 Cal. App. 4th at 593; *Thompson*, 18 Cal. App. 4th at 57-58 (certificate of occupancy was wrongly withheld; "once the building permit has been issued, it cannot be de facto revoked by the simple expedient of never issuing the certificate of occupancy.") The SDMC is just as clear: Blackwater is entitled to use and occupy its Otay Mesa facility. *See* SDMC § 129.0114 (if requirements are met, the City "shall issue a certificate of occupancy.") Blackwater satisfied all requirements with regard to the Otay Mesa facility on April 30, 2008, and as a result the City had a ministerial and nondiscretionary duty to issue a Certificate of Occupancy. Complaint ¶¶ 42-43. There is simply no uncertain or doubtful legal issue that justifies abstaining in favor of a state-court determination.

The City argues that there is an issue of first impression as to "whether the training of military personnel to respond to simulated terrorist attacks is an authorized land use that falls within the definition of 'vocational training' in accordance with the OMDD Ordinance." Mot. at 9:13-15. However, nothing in the Complaint suggests that this is an issue that the Court needs to decide to adjudicate this case. According to the City, the "City should be given an opportunity to make a final decision on this issue based on the totality of circumstances," *id.* at 9:17-18. However, this takes the City outside *Pullman* abstention, which envisages federal courts abstaining to allow neutral judicial bodies, such as state courts, to determine doubtful state law issues. Here, the City is requesting this court to defer *to the City*, that is, to a party to this adversary litigation, not a neutral judicial decision-maker. The City's argument also depends upon the already refuted claim that somehow the City may require further discretionary review of the Otay Mesa facility, a claim that is baseless in both law and fact, see Section III(A) above. See also Blackwater's Reply to Opposition to Preliminary Injunction [Doc. 24] at 12-15.

Second, there is no "sensitive social policy" issue here. Blackwater is not asking the Court to substitute its discretion for the City's. Blackwater is merely asking the Court to apply the City's own laws, which clearly required the ministerial step of issuing the Certificate of

Occupancy for the Otay Mesa facility. Because issuance of that certificate was required under local law (SDMC § 129.0114) and the facts alleged in the Complaint (¶¶ 42-43), and state law is in full accord (*Inland Empire Health Plan*, 108 Cal. App. 4th at 593, *Thompson*, 18 Cal. App. 4th at 57-58), there is no "policy" issue involved, let alone a "sensitive social policy." The ministerial, mandatory issuance of a Certificate of Occupancy is simply not a sensitive social issue that requires abstention. *United States v. Morros*, 268 F.3d 695, 704 (9th Cir. 2001) (declining to abstain because "it is clear that the [state official's] decision not only comports with [state] law, but is in fact dictated by it.").[4]

The City claims that whether a direct suit for violation of the California Constitution is allowed "touches upon sensitive issues of state policy." Mot. at 8:9-11. However, the California Supreme Court has held, since at least 1975, that aggrieved persons may sue for injunctive and declaratory relief for violation of the California Constitution. *See Katzberg v. Regents of the Univ. of Cal.*, 29 Cal. 4th 300, 307 (2002) (citing *Skelly v. State Personnel Bd.*, 15 Cal. 3d 194 (1975)). The City next claims that certain "land-use planning questions" concerning the use of the Otay Mesa facility "touch a sensitive area of social policy" (Mot. at 8:17-25), but that claim depends upon the now-refuted notion that the applicable rules are not clear and that the City may require further discretionary review of Blackwater's use of the Otay Mesa facility, see Section III(A) above.

Because the City cannot satisfy two out of the three required elements for *Pullman* abstention, the Court must reject the City's argument based on *Pullman* abstention.

2. *Younger* Abstention

The City also argues that the Court should dismiss this case pursuant to *Younger* abstention. Mot. at 10-12. However, "the rule [is] that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States" pursuant to *Younger* abstention.

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[4] The cases cited by the City are distinguishable because they involved sensitive land use issues. *E.g.*, *C-Y Development Co. v. City of Redlands*, 703 F.2d 375 (9th Cir. 1983) ("Delicate issues of land use *planning*" required abstention); *Pearl Investment Co. v. City and County of San Francisco*, 774 F.2d 1460 (9th Cir. 1985) (renovation of building so as to displace twenty-four residential tenants); *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401 (9th Cir. 1996) (land designated as environmentally sensitive habitat).

New Orleans Pub. Serv. Inc. v. Council of the City of New Orleans, 491 U.S. 350, 368 (1989) [*NOPSI*]. "[A]lthough there are limited circumstances in which such abstention by federal courts is appropriate, those circumstances are 'carefully defined' and 'remain the exception, not the rule.'" *Green v. City of Tucson,* 255 F.3d 1086, 1089 (9th Cir. 2001) (en banc) (citing and quoting *NOPSI,* 491 U.S. at 359).

"Before *Younger* abstention can be applied to dismiss a federal claim, three requirements must be met: (1) there must be ongoing state judicial proceedings, (2) the state judicial proceedings must implicate important state interests, and (3) the state judicial proceedings must afford the federal plaintiff an adequate opportunity to raise constitutional claims." *Agriesti v. MGM Grand Hotels, Inc.*, 53 F.3d 1000, 1001 (9th Cir. 1995). The basic problem here is that there are no ongoing state judicial proceedings. The City does not and cannot identify a single state court proceeding that this Court should defer to or that this Court is somehow interfering with by exercising jurisdiction over this action.

What the City seems to be arguing is that (1) there would be an ongoing state administrative proceeding if Blackwater had sought administrative review (for example, in the Planning Commission or the City Council) of the City's refusal to issue a Certificate of Occupancy, and (2) there is an ongoing administrative proceeding relating to Blackwater's ship simulator permit. This argument fails for a number of reasons. First, the City fails to show—and does not even claim—that either the potential or actual administrative proceedings are or would be "judicial in nature." "While we have expanded *Younger* beyond criminal proceedings, and even beyond proceedings in courts, we have never extended it to proceedings that are not 'judicial in nature.'" *NOPSI,* 491 U.S. at 369-70. There is no basis in the Complaint for concluding that the City's contemplated proceedings are or would be judicial in nature. Indeed, the only reasonable inference from the Complaint is that proceedings before the Planning Commission or the City Council would be political, not judicial in nature, given that the City refused to issue a Certificate of Occupancy for purely political reasons rather than the merits of Blackwater's application. Complaint ¶¶ 2-3, 44-46.

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Second, the City assumes that, on the facts of this case, the City was entitled to deny a Certificate of Occupancy to undertake discretionary review of the Otay Mesa facility and that *Younger* abstention is appropriate because this Court is somehow interfering with that further discretionary review. That argument is baseless because, on the alleged facts, the City was required to issue a Certificate of Occupancy and was not entitled to further discretionary review, see Section III(A) above.

Third, § 1983 plaintiffs such as Blackwater are not subject to the rule of exhaustion of administrative remedies. The rule is that "plaintiffs have no duty to exhaust their state administrative or judicial remedies before pursuing a [42 U.S.C.] § 1983 action in federal court." *Green,* 255 F.3d at 1102. *See Patsy v. Bd. of Regents,* 457 U.S. 496, 516 (1982) (plaintiff in § 1983 race discrimination action could not be barred from federal court on the ground that she had failed to appeal her termination through an available state administrative proceeding); *Steffel v. Thompson,* 415 U.S. 452, 472-73 (1974) ("When federal claims are premised on 42 U.S.C. § 1983 . . . we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights.") Thus, Blackwater's failure to pursue administrative remedies the City claims to be available does not render this action improper or subject to dismissal.

Fourth, any proceeding before the City Council or the Planning Commission would, in effect, be a proceeding to review the City's refusal to issue a Certificate of Occupancy. Assuming *arguendo* that those proceedings would be "judicial," "it has never been suggested that *Younger* requires abstention in deference to a state judicial proceeding reviewing legislative or executive action." *NOPSI,* 491 U.S. at 368. Since Blackwater would be seeking relief from the Planning Commission (or City Council) in this hypothetical, *Younger* abstention would not apply because Blackwater would be seeking relief as a plaintiff in both federal and state proceedings. *Green,* 255 F.3d at 1098 ("our case law has recognized that such parallel state and federal affirmative lawsuits challenging state action ... do not implicate the *Younger* doctrine"). "*Younger* abstention ordinarily would not apply when a federal plaintiff also is the plaintiff in state court." *Fresh Int'l Corp. v. Agric. Labor Relations Bd.*, 805 F.2d 1353, 1369 n. 8 (9th Cir. 1986).

Fifth, to the extent that the City is claiming Blackwater's participation in an administrative process – by, for example, appealing the City's refusal to issue a Certificate of Occupancy to the Planning Commission or the City Council – adequately protected Blackwater's interests and rights under federal law, such a claim is both baseless and inconsistent with the Complaint. The City refused to issue the Certificate of Occupancy on May 19, 2008 (Complaint ¶¶ 51-53 & Ex. D thereto), two weeks before Blackwater was contractually required to begin performing its contract with the U.S. Navy (*id.* ¶ 23). The City nowhere explains how following an administrative appeal process – rather than bringing suit in this Court and seeking temporary and preliminary relief – would enable Blackwater to timely begin performing its contract. Blackwater was fully justified in seeking relief in federal court.

In summary, the Court should reject the City's argument based on *Younger* abstention because none of the required elements therefor are satisfied.

D. Plaintiff Has Properly Stated Claims For Injunctive And Declaratory Relief

The City argues that Plaintiff has failed to state a claim for injunctive or declaratory relief. The City's sole basis for its argument is that Blackwater's claims are not ripe and "The City's Land Use Approvals Have Not Been Completed." Mot. at 13-15. As explained above, Section III(A), the City has failed to show either that the City was entitled to undertake, or that the Otay Mesa facility was required to undergo, discretionary review. In contrast, the Complaint alleges that the City issued its final approval of the Otay Mesa facility on April 30, 2008, including the approval of a Certificate of Occupancy. Complaint ¶¶ 42-43. The City's about face on May 19, 2008 (*id.* ¶¶ 51-53) was motivated by concerns of electoral politics. *Id.* ¶¶ 2-3, 44-46. Blackwater's claims for injunctive and declaratory relief were properly addressed to the decision that the City made on May 19, 2008 when it determined not to issue a Certificate of Occupancy.

E. Plaintiff Has Properly Stated Claims for Violation of Procedural Due Process

The City claims that Blackwater has failed to state a claim for relief for violation of procedural due process. The City granted Blackwater's building permits, approved its remodeling, conducted its final inspection of the Otay Mesa facility and approved issuance of a

Certificate of Occupancy on April 30, 2008. Complaint ¶¶ 41-43; RJN Ex. F. Under SDMC § 129.0114, Blackwater was entitled to a Certificate of Occupancy and issuance of such certificate by the City was mandatory. *See also Inland Empire Health Plan,* 108 Cal. App. 4th at 593 ("a city has a mandatory duty to issue a certificate of occupancy once it has found that a construction project has complied with all requirements"); *Thompson,* 18 Cal. App. 4th at 57-58("once the building permit has been issued, it cannot be de facto revoked by the simple expedient of never issuing the certificate of occupancy.")

"The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of *liberty* and *property*." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-70 (1972) (emphasis added). "Property interests ... are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* at 577.

The Ninth Circuit has held that state statutes providing for particular procedures amount to "entitlements" protected by due process. *See Parks v. Watson*, 716 F.2d 646, 656 (9th Cir. 1983) (citing *Mabey v. Reagan*, 537 F.2d 1036, 1042 (9th Cir. 1976)); *see also Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988). This means that, where the applicable governmental agency is left little to no discretion whether to grant a permit, the denial of that permit creates a protectable right. In *Parks*, the Oregon statute at issue (Or. Rev. Stat. § 271.120 (1981)) specified that in ruling on a particular petition, the agency "shall" determine three issues, and, if those three matters were determined in favor of the petition, the governing body "shall" grant the petition. In other words, "[o]nce the conditions are met the city lacks discretionary powers." *Parks,* 716 F.2d at 657. Thus, as the petitioner met the conditions but was denied the petition, the court held that the petitioner could bring a due process claim under 42 U.S.C. § 1983. *Id.*

Here, Blackwater obtained all necessary Building Permits, passed final inspection and obtained approval for a Certificate of Occupancy. Under state law, the City was required to issue a Certificate of Occupancy and Blackwater's right to a Certificate of Occupancy was a property right protected under principles of procedural due process. An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). "In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking." *Zinermon v. Burch*, 494 U.S. 113, 132 (1990) (citing *Loudermill*, 470 U.S. at 542). Due process generally requires "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." *Sanchez v. City of Santa Ana*, 915 F.2d 424, 429 (9th Cir. 1990) (citing *Loudermill*, 470 U.S. at 542). Here, the City deprived Blackwater of the Certificate of Occupancy to which Blackwater was entitled as a matter of state law without a predeprivation hearing, and thereby deprived Blackwater of procedural due process.

The City's Motion simply fails to address that under SDMC § 129.0114, *Inland Empire Health Plan* and *Thompson* (none of which it cites), Blackwater was entitled to a Certificate of Occupancy. The City likewise fails to recognize that under *Parks v. Watson,* this entitlement was protected under principles of procedural due process. Finally, the City fails to address that under *Loudermill, Zinermon* and *Sanchez,* the City was required to provide a hearing before it deprived Blackwater of the Certificate of Occupancy to which Blackwater was entitled, and that by failing to do so, the City violated Blackwater's rights to procedural due process. The City's only argument is that "because the City's land use process has not been completed, [Blackwater] does not yet have a property interest worthy of protection." Thus, the City again depends upon the already-refuted assumption that further land use review was required. As explained above in Section III(A), the City has failed to show either that the City was entitled to undertake, or that the Otay Mesa facility was required to undergo, discretionary review.[5]

[5] The City separately attacks Blackwater's state due-process and equal-protection claims. Mot. at 23-26. Because the City does not identify any unique analysis required for those state constitutional claims as opposed to their federal counterparts, Blackwater does not repeat its defense of those claims. Blackwater's state due process and equal protection claims survive for the same reasons that its federal due-process and equal-protection claims do.

F. Blackwater Has Properly Stated Claims For Violation of Equal Protection And The Dormant Commerce Clause

The City also argues that Blackwater has failed to state a claim for violations of equal protection and the dormant commerce clause. Mot. at 19-21, 24-26 (equal protection), 22-23 (dormant commerce clause). As to equal protection, Blackwater alleges that other vocational/training facilities and other target ranges were not required to undergo the "special approval" process or discretionary review process the City attempted to impose upon Blackwater and the Otay Mesa facility. Complaint ¶¶ 75, 100. The City argues that it is entitled to treat Blackwater differently because SDMC § 53.10 precludes the firing of firearms within the city limits. Mot. at 21:6-11. However, the SDMC specifically excepts "shooting galleries or target ranges" from this rule. SDMC § 53.10(d). The City claims that "Blackwater has alleged no facts that reflect that it has actually been treated differently from another entity engaged in similar types of activities," Mot. at 21:19-20, but this is plainly inconsistent with Complaint ¶¶ 75, 100, and therefore improper on a 12(b)(6) motion. Indeed, Blackwater specifically alleges that the City has treated other vocational schools and target ranges differently than Blackwater, and *not* required those other institutions to undergo the additional review that the City proposes for Blackwater. Complaint ¶ 75. Whether Blackwater has been treated differently and whether the City has a "rational basis" for such differential treatment – as opposed to nonrational political considerations – is clearly a factual issue that cannot be decided on this 12(b)(6) motion.

As to the dormant commerce clause, Blackwater alleges the City discriminated against it as an out-of-state company by refusing to issue a Certificate of Occupancy for the Otay Mesa facility, whereas such certificates were routinely issued for in-state companies. Complaint ¶ 88. The City also attempted to require Blackwater to obtain "special approvals" or undergo a "discretionary process," so as to impose regulatory measures on Blackwater designed to benefit in-state economic interests by burdening out-of-state competitors such as Blackwater. *Id.* ¶¶ 85 & 87. Under the dormant commerce clause, the City may not adopt "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Dep't of Rev. of Kentucky v. Davis,* 128 S.Ct. 1801, 1808 (2008) (citation and internal quotes omitted).

The City claims that "[t]here is simply no basis to claim … that Blackwater is being singled out for disparate treatment," Mot. at 22:23-25, but that assertion is plainly inconsistent with the facts alleged in Complaint ¶¶ 85, 87-88. Again, whether "Blackwater [has been] singled out for disparate treatment" as an out-of-state company is a factual issue that cannot be resolved on this 12(b)(6) motion.

G. **Blackwater's Claims Are Not Barred By The Government Claims Act**

The City argues that all of Blackwater's claims are barred by the California Government Claims Act, Government Code § 910 *et seq.*, which purportedly requires filing a claim with a governmental entity prior to suing that entity in court. (Mot. at 26-27.) This argument fails for three reasons. First, as the City itself concedes, the Claims Act only applies to claims *for money or damages*; it does *not* apply to claims for declaratory or injunctive relief. *See Minsky v. City of Los Angeles,* 11 Cal. 3d 113, 121 (1974). Thus, even if the City's argument were otherwise valid, the most it would require is striking Blackwater's request for damages. Prayer for Relief, ¶ 4, Complaint at 27:18-19. It would not show that Blackwater had failed to state claims under federal and state law for declaratory or injunctive relief.

Second, under the Supremacy Clause of the United States Constitution, Art. VI, cl. 2, the City's argument cannot apply to Blackwater's federal claims. Since federal law, *e.g.*, 42 U.S.C. § 1983, does not require a plaintiff to comply with a pre-suit claim process, state law cannot burden a plaintiff's right to sue under federal law by requiring compliance with such a process. *See, e.g., Felder v. Casey,* 487 U.S. 131, 153 (1988); *Ellis v. City of San Diego,* 176 F.3d 1183, 1191 (9th Cir. 1999).

Third, under California law, the Claims Act does not apply where the primary relief sought is injunctive or declaratory relief, and any money damages are merely incidental. See, e.g., *Eureka Teacher's Assn. v. Board of Education*, 202 Cal.App.3d 469, 475 (1988) (request for back pay and fringe benefits incidental to mandamus action for reemployment and therefore not subject to Claims Act); *M.G.M. Constr. Co. v. Alameda County*, 615 F. Supp. 149, 151 (N.D. Cal. 1985) ("the notice of claims provision should not apply to this suit since the primary relief sought is a declaration that the County's affirmative action program violates state law"). Here, the primary relief sought by Blackwater is injunctive and declaratory; money damages are merely incidental. Indeed, the only remedy sought for Blackwater's state law or common law claims is injunctive or declaratory relief. See Complaint ¶¶ 60, 64, 96, 104.

For the reasons set forth above, the City's argument based on the pre-suit claim provisions of the California Government Claims Act is invalid and does not provide a basis for dismissing any of Blackwater's claims.

IV. CONCLUSION

For the reasons stated above, the Court should deny Defendants' Motion to Dismiss pursuant to Rule 12(b)(6).

Dated: July 28, 2008

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